

FEDERAL CIRCUIT COURT OF AUSTRALIA

*TAM & ANOR v MINISTER FOR IMMIGRATION
& ANOR*

[2018] FCCA 3728

Catchwords:

MIGRATION – Partner visa – applicant applied for both a temporary partner (subclass 820 visa) and a residence partner visa (subclass 801 visa) contemporaneously – Ministerial Delegate declined to grant both visas – decision subject to unsuccessful merits review – Ministerial Delegate identified error in manner in which applicant was notified of decision regarding 801 visa following merits review – decision capable of merits review and judicial review – essential precondition to grant of 801 visa existence of 820 visa – whether one decision or two – nature of jurisdiction error – no error established – non disclosure of section 375A certificate – whether applicant denied procedural fairness – no unfairness established – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5CB; 66; 351; 375A; 474; 476
Migration Regulations 1994: r.1.09A

Cases cited:

Craig v South Australia (1995) 184 CLR 163
Basra v Minister for Immigration & Border Protection [2018] FCA 422
Minister for Immigration & Multicultural Affairs v Bhardwaj (2002) 209 CLR 597
Minister for Immigration & Border Protection v CQZ15 [2017] FCAFC 194

First Applicant:

SIN YING TAM

Second Applicant:

MUHAMMAD FAIZ SHU TUNG TAM

First Respondent:

MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent:

ADMINISTRATIVE APPEALS
TRIBUNAL

File Number:

ADG 131 of 2017

Judgment of:

Judge Brown

Hearing date: 26 October 2018
Date of Last Submission: 26 October 2018
Delivered at: Adelaide
Delivered on: 20 December 2018

REPRESENTATION

Counsel for the Applicant: Mr Smart
Solicitors for the Applicant: Old Port Chambers
Counsel for the First Respondent: Mr Evans
Solicitors for the First Respondent: Australian Government Solicitor
Counsel for the Second Respondent: Submitting appearance

ORDERS

- (1) The application filed 7 April 2017, as amended on 13 September 2018 is dismissed.
- (2) The applicant pay the first respondent's costs fixed in the amount of \$6,000.00.
- (3)
- (4)
- (5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT ADELAIDE

ADG 131 of 2017

SIN YING TAM

First Applicant

MUHAMMAD FAIZ SHU TUNG TAM

Second Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application for judicial review of a decision of the Administrative Appeals Tribunal “the AAT” made on 10 March 2017 in respect of an application brought by Sin Ying Tam. The proceedings relate to her application for two distinct but related visas issuable pursuant to the provisions of the *Migration Act 1958* “the Act” and the Regulations made under it.

2. On 10 July 2012, the applicant, who is a citizen of Hong Kong applied for:
 - a) a Partner (Temporary) (Class UK) (subclass 820) visa; and
 - b) a Partner (Residence) (Class BS) (subclass 801) visa.
3. It is convenient to refer to these visas as the “temporary visa” for the 820 visa and the “permanent visa” for the 801 visa respectively.
4. Ms Tam utilised a single application form to apply for both visas. She did so by ticking a box, on the form, under the heading *Type of Application – select one only Partner*, set against the following statement:

“In Australia
Class UK (Partner – Temporary) (subclass 820)
Class BS (Partner – Residence) (subclass 801)”
5. The other box, potentially able to be ticked, to satisfy the direction that *only one was to be selected*, was referable to analogous visas, which could be applied for *outside of Australia*.
6. The second applicant, Muhammad Faiz Shu Tung Tam is Ms Tam’s son. He was born, in Hong Kong, on 23 July 2002. Master Tam is to be regarded as a subsidiary visa applicant. The success or otherwise of his application for a visa, under the Act, depends on whether his mother is granted a visa.
7. In her application, Ms Tam indicated that she was in a de facto relationship with an Australian citizen, Mr Geoffrey Munn. Mr Munn had sponsored Ms Tam to immigrate to Australia on the basis of that a de facto relationship existed between the two.
8. The criteria to be satisfied, before a temporary visa is granted by the relevant delegate of the Minister for Home Affairs,¹ are set out in clause 820.211 of Schedule 2 to the *Migration Regulations 1994*. In general terms, before the visa in question can be granted, the applicant

¹ Previously known as the Minister for Immigration & Border Protection and hereinafter referred to as “the Minister” or “the Ministerial delegate”

concerned must satisfy the Ministerial delegate that he/she is the *spouse* or *de facto partner* of a person, who is an Australian citizen.

9. The expression *de facto partner* and *de facto relationship* are defined in section 5CB of the Act. In order for any two individuals to be regarded as *de facto partners* the relationship between them must be characterised by the following elements:
 - 0 they have a mutual commitment to a shared life to the exclusion of all others;
 - 1 the relationship between them is genuine and continuing;
 - 2 they live together; or
 - 3 they do not live separately and apart on a permanent basis;
 - 4 they are not related.
10. Further criteria, required to be considered by any decision-maker in the context of a migration decision involving a *de facto* relationship, are set out in Regulation 1.09A of the *Migration Regulations 1994*. Amongst other things, the decision-maker is required to consider the financial aspects of the relationship concerned and the nature of the household involved.
11. The criteria to be satisfied, in respect of a permanent visa, are set out in clause 801.221 of the Regulations. The distinction between a temporary visa and a permanent visa is that the former is temporary in nature but the latter is permanent. In practical terms, a temporary visa is a precursor to a permanent visa being issued.
12. For this reason, any non-Australian citizen, who seeks a visa on the basis of the existence of a *de facto* relationship, with an Australian citizen, is required to apply for both visas concurrently. After a period of time, following the grant of a temporary visa, a permanent visa is granted, which effectively substitutes for the temporary visa on a permanent basis.
13. For this reason, there is one significant condition, which must be met, prior to the granting of a permanent visa, namely that at the time of grant, the applicant concerned is the holder of a current temporary visa

and continues to be sponsored by an Australian citizen, as a consequence of a de facto relationship between the two.

14. On 22 March 2013, the Ministerial delegate declined to grant the applicant and Master Tam the visas sought in the application on the basis that it was not satisfied that there was a genuine de facto relationship between Ms Tam and Mr Munn. In the relevant decision record, the delegate concerned is identified as “Damien”. His decision addresses both the refusal to grant a permanent visa and a temporary visa.²
15. The Ministerial delegate also signed a certificate, pursuant to section 375A of the Act prohibiting access to portions of the departmental file other than to the MRT. These portions related to “*allegation from sponsor’s daughter*”. Damien certified that it was in the public interest to do so.³
16. The decision record was forwarded to Ms Tam, under cover of a letter dated 22 March 2013, also executed by Damien. It informed her the decision was reviewable. The preamble to the letter reads as follows:

“This letter refers to your application for a combined Partner (Temporary) Visa (Class UK 820) and (Permanent) (Class BS 801) which was lodged at DIAC office on 10th July 2012.

I wish to advise you that the application for this visa has been refused...”⁴
17. Accordingly, there is some ambiguity in respect of this letter, which refers to the refusal of a visa (singular) rather than of two visas.
18. The applicant sought to review this decision in the Migration Review Tribunal (“the MRT”).⁵ The MRT dealt with Ms Tam’s application to review the Ministerial delegate’s decision on 24 April 2014. The Tribunal affirmed the decision not to grant Ms Tam and her son a Partner (Temporary) (Class UK 820) visa.
19. The hearing before the Tribunal took place in two parts, which occurred on 6 February 2014 and 20 March 2014. During the hearing

² See Case Book at page 86

³ Ibid at page 92

⁴ See Case Book at page 81

⁵ The review functions of the Migration Review Tribunal are now undertaken by the AAT

both Ms Tam and Mr Munn gave evidence. In addition, another person Lynette Beeby was summonsed, by the Tribunal, to give evidence regarding the nature of the relationship between Ms Tam and Mr Munn, as she perceived it.

20. Mr Munn was born in 1932. Ms Tam was born in 1979. Ms Beeby is Mr Munn's daughter. She has also been appointed her father's guardian pursuant to the *Guardian & Administration Act*. Ms Beeby provided to the Tribunal medical evidence regarding her father's state of health, which indicated that he was suffering from some form of dementia, which impacted on his memory and capacity to make decisions.
21. The MRT summarised Ms Beeby's evidence regarding her perceptions of the nature of the relationship between her father and Ms Tam. It is clear from this summary that Ms Beeby does not have a positive view of Ms Tam and disputes her assertion that she looked after Mr Munn or the two were in an affectionate relationship.
22. The Tribunal member also conducted a site visit to the home, in which Mr Munn and Ms Tam lived. The observations involved supported the Tribunal's finding that Mr Munn and Ms Tam lived in separate rooms. It also found that Ms Tam spent significant periods of time away from the property concerned.
23. It is clear from the MRT's decision that it accepted much of Ms Beeby's evidence and rejected much of Ms Tam's. It made findings in respect of each of the criteria specified in section 5CB and Regulation 1.09A. There is no specific reference to any material falling within the section 375A certificate issued by Damien.
24. The Tribunal concluded as follows:

"The Tribunal finds that the parties have known each other since 2003 and have lived together since 2010. The Tribunal is not satisfied that Ms Tam provides Mr Munn with companionship and emotional support given her absences that concerned him to the extent he called the police. The Tribunal is also not satisfied Ms Tam sees the relationship as long term."

While Mr Munn and Ms Tam live together, jointly provide care for Muhammad and share household tasks, the Tribunal is not satisfied that the financial aspects of the relationship support it being a genuine and continuing relationship, or that Ms Tam has a genuine commitment to a shared life with Mr Munn.”⁶

25. On this basis, the Tribunal affirmed the decision of the Ministerial delegate not to grant Ms Tam and Master Tam the visas sought by them. This decision was provided to Ms Tam by letter faxed on 28 April 2014. The decision was not subject to judicial review in this court. Rather, on 26 May 2015 the applicant sought Ministerial intervention pursuant to section 351 of the Act. Significantly, it was not subject to judicial review in this court.
26. The notification of 28 April 2014 affirmed the decisions under review. It referenced only the refusal of a temporary partner visa applications. It did not refer to any decision relevant to the permanent visa applications, which had been applied for concurrently by Ms Tam and Master Tam with the temporary partner visas.
27. It seems clear that the Minister declined to intervene in the matter in a manner which was favourable to the applicants. On 11 May 2016, a person identified as “Jolene” described as a “*Manager in the Temporary Partner Processing Centre*” of the Department of Immigration, wrote to Ms Tam in the following terms:

“The department has assessed your case and found you were not correctly notified of the decision in respect of the application for Partner (Residence) (Class BS) (Subclass 801) visa.

Because of this I am now re-notifying you that your application for the grant of a Partner (Residence) (Class BS) (Subclass 801) visa has been refused.

After careful consideration of all information provided, the delegate who signed the attached decision record was not satisfied that you met the relevant criteria for the grant of the visa as provided in Australian migration law.

Your application for the grant of a Subclass 801 visa was refused because you did not satisfy clause 801.221 of the Migration Regulations 1994 ... These subclauses require that the applicant holds or held a subclass 820 visa. You could not satisfy any of the

⁶ See casebook at page 179 [65]-[66]

subclauses in clause 801.221 because your application for the grant of a subclass 820 visa was refused so you do not hold and have not held a subclass 820 visa.

The attached decision record also has the decision on your Partner (Temporary) (Class UK) (Subclass 820) visa application but you are not being re-notified of that decision.”⁷

28. The letter is not, in my view, felicitously expressed. Attached to the letter of 11 May 2016 was a further copy (in identical terms) of the decision record made on 22 March 2013, in which the Ministerial delegate (Damien) had declined to grant each of the visas in question. The import of the letter was that Ms Tam was being correctly informed of the decision to refuse her permanent visa by means of this letter, which had no direct application to the decision to refuse her the temporary visa.
29. Necessarily this entailed her being provided with the relevant decision record again. However, in a formal sense, she was being advised only of the refusal of the permanent visa, it being the position of the Department that no deficiencies had occurred in respect of the notification of the refusal to grant Ms Tam a temporary visa. Hence, although she got the same decision record again, it had currency only in respect of the permanent visa.
30. The letter went on to indicate that the decision was capable of being reviewed in the AAT. In this context, on 1 June 2016, Ms Tam applied to the AAT to review the decision to refuse her a permanent visa in the decision of 22 March 2013.⁸ Her application is specific in this regard.
31. Her application was allocated a hearing time of 9 March 2017 and she and Master Tam were invited to give evidence before the Tribunal. Ms Tam provided further written evidence to the Tribunal in which she alleged she had been the subject of family violence from Mr Munn.
32. Ms Tam was also critical of Ms Beeby and of a medical report, from a clinical neuropsychologist, Dr Field who had examined Mr Munn, in the presence of Ms Beeby, on 23 April of 2014. These submissions were likely to have had application to the matters, which fell within the remit of first decision of the MRT, made on 24 April 2014.

⁷ See Case Book at page 139

⁸ See Ms Tam’s *Application for Review – Migration* at Case Book at page 184

The decision of the AAT made on 10 March 2017

33. In its decision of 10 March 2017, the AAT characterised subclass 801 visas as being “*the second stage of the partner visa process*”. Thereafter the Tribunal set out the procedural history of the relevant applications, noting the following:

5 The delegate’s decision had been made on 22 March 2013 to refuse both the application for a temporary and permanent visa;

6 This decision had been subject to review in the MRT;

7 On 24 April 2014 the MRT had affirmed the delegate’s decision not to grant the visas;

8 The applicants had sought ministerial intervention on 11 May 2015;

9 In the letter of 11 May 2016, the departmental delegate had re-notified Ms Tam only in respect of the decision relating to the permanent visa refusal;

10 This letter “*expressly stated that the applicant was not being informed*” in respect of the temporary visa application.

34. Following this summary, the AAT made the following findings:

“I am satisfied that the applicant sought review of the Subclass 801 decisions within the requisite time period from the re-notification on 11 May 2016, and that it is a valid application for review.

I conclude that as the applicants were not re-notified of the subclass 820 decisions they have no right to seek review of those decisions again.

In any event, there has already been a review conducted of the subclass 820 decision in relation to each of the applicants. The only decision which can be reviewed by this Tribunal is that related to the subclass 801 decision in respect to each of the applicants. This Tribunal cannot hear appeals from itself. If an applicant does not agree with a decision made by the Tribunal it is open to either the applicant, or the Department, to appeal the decision to the Federal Circuit Court. There is a time period for

appeals to be lodged to the Court from the Tribunal's decisions and a process available if the period of time is not adhered to."⁹

35. At the hearing on 9 March 2017, Ms Tam was asked by the Tribunal Member whether she had held or currently held a temporary visa. She indicated that she did not and had not done so. This is axiomatically the case and led to a finding to this effect.¹⁰ In these circumstances, the AAT further found that Ms Tam had not satisfied one of the regulatory stipulated criterion for the grant of a permanent visa – the visa application subject to the review.
36. On this basis, Ms Tam's application for review was dismissed. The Tribunal noting that it could not *revisit* the refusal of the temporary visa to Ms Tam, which had also been subject to merits review in the MRT. As such, it was not open to the Tribunal to consider evidence possibly germane to the grant of a temporary visa relating to exposure to family violence. The same line of reasoning applied to the visa application of Master Tam.
37. The rationale of the AAT's decision turns on its view that Ms Tam had applied for two separate and distinct visas, albeit on one application form. Its interpretation of the statutory principles applicable was that the grant of a temporary visa is an essential precursor to the grant of a permanent visa.
38. In this context, it determined that the merits review of the decision to refuse the temporary visa had been completed in April 2014 and the only matter before it was an application for merits review of the decision of the ministerial delegate not to grant a permanent visa, which had been re-notified to Ms Tam on 11 May 2016.
39. In these circumstances, it was not open to the Tribunal to consider evidence relating to the criteria applicable to the possible grant of a temporary visa, namely the nature of the relationship between Mr Munn and Ms Tam.
40. Counsel for Ms Tam, Mr Smart takes a different view, it is his submission that the permanent and temporary visa decisions are indivisible. That being so, notwithstanding the statement on its face,

⁹ See Case Book at page 239 [9] – [11]

¹⁰ Ibid at page 240 [15]

the effect of the Departmental letter of 11 May 2016 is to open the question of each visa refusal to review by the AAT, which accordingly fell into error by not considering the material put forward by Ms Tam regarding the nature of her relationship with Mr Munn, as germane to her visa application.

The legal principles applicable

41. Section 65 of the Act requires the Minister to grant a visa if satisfied that relevant criteria attaching to the visa sought have been satisfied. Part 7 of Division 3 of the Act provides the process by which the AAT is authorised to review migration decisions made by the Minister.
42. Pursuant to section 476(1) of the Act, the Federal Circuit Court has *“the same original jurisdiction in relation to migration decisions as the High court under section 75(v) of the Constitution.*
43. This provision of the Constitution grants original jurisdiction, to the High Court, in matters of mandamus against any officer of the Commonwealth. In his application, the applicant seeks that such a writ issue to the AAT, after its decision has been quashed and it be thereafter directed to re-hear their application according to law.
44. However, pursuant to section 476(2), the Federal Circuit Court has no jurisdiction in relation to what are categorised as *privative clause decisions*. This expression is defined in section 474(2) as meaning a decision of an *administrative character made* under the Act. The decision relevant to these proceedings is such a privative clause decision.
45. Pursuant to section 474(1) privative clause decisions are deemed to be *final and conclusive* and as such, not capable of being subject to challenge in court or to the issue of any constitutional writ, which is the remedy sought by the applicants.
46. However, the High Court has held that the provisions of section 476 do not prevent the review of decisions, made by the Tribunal, which are affected by jurisdictional error; have been made in bad faith; or in denial of natural justice.

47. In general terms, an administrative Tribunal exceeds its powers and thus falls into jurisdictional error, if it identifies a wrong issue; asks a wrong question; ignores relevant material; relies on irrelevant material; or, in some circumstances, makes an erroneous finding or reaches a mistaken conclusion, in a way that affects the exercise or purported exercise of the power conferred upon it.¹¹
48. It is important to note that, in exercising its jurisdiction under section 476(1) of the Act, the court is not authorised to conduct a merits review of the hearing in question or to substitute its own findings of fact for those of the Tribunal. The court's jurisdiction, on review, is confined to the determination of whether a jurisdictional error has been established.

The Grounds of Review

49. The grounds of review, as amended on 14 September 2018, centre on the provisions of section 66 of the Act and what is asserted to have been the defective manner in which the visa decision was conveyed to Ms Tam. It is also asserted that Ms Tam was denied procedural fairness and her application was not properly assessed. She also complains that she only became aware of the section 375A certificate as a result of these proceedings.

50. The grounds of review are as follows:

“That the Tribunal member was unlawfully made, in that the Tribunal member ignored the relevant evidence before it and made finding of fact that were patently unreasonable so as to constitute reviewable error.

That the Tribunal member erred in law in ignoring my circumstances, failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe.

That the Tribunal member erred in law in that she misconstrued the facts and or based decisions on erroneous finding of fact what is made in a perverse manner or without regard to the material before it.

¹¹ See *Craig v South Australia* (1995) 184 CLR 163

That the Tribunal member erred in law, failing to taking account of relevant consideration and application of proper standard of assessment under section 348, section 353 and section 359A of the Migration Act.

Such further and others grounds as the Applicant may advise and this Honourable Court permit.”

Discussion

51. It is common ground that the decision of the ministerial delegate did not strictly comply with the provisions of section 66 of the Act. In general terms, the section requires an unsuccessful visa applicant to be notified of the following:
- 11 the criterion which was not satisfied;
 - 12 the statutory/regulatory provision which was not satisfied;
 - 13 written reasons as why either a criterion or a statutory/regulatory provision has not been satisfied;
 - 14 whether the decision is reviewable and any applicable timeframes.
52. The effectiveness of Mr Smart’s case relies on the court accepting the proposition that there was only one visa decision, made on 22 March 2013, the import of which was improperly conveyed to Ms Tam. If this is correct, he, in effect submits, it renders the decision of the MRT, made on 24 April 2014, irrelevant to these proceedings, as Ms Tam is entitled to a full merits review of the composite visa decision made on 22 March 2013 by Damien.
53. On this basis, Mr Smart contends that the AAT was required to undertake a review of the entire decision making process leading to the decision of 22 March 2013. This includes giving Ms Tam the opportunity to present evidence regarding the nature of her relationship with Mr Munn and make submissions regarding the matters specified in section 5CB and Regulation 1.09A. Because she was not able to do so, it is submitted the Tribunal did not exercise the jurisdiction conferred upon it.

54. This was an issue considered by Moshinsky J in *Basra v Minister for Immigration & Border Protection*.¹² As with this case, *Basra* was concerned with a ministerial decision pertaining to the non-granting of both a temporary and permanent partner visa, which was conveyed in one document rather than two and where there were issues relating to how the decision had been made in respect of one of the visas in question.

55. His Honour specifically considered whether the regulatory regime concerned encompassed one or two separate decisions. He said as follows:

“Given this statutory scheme, I consider that the first delegate’s decision should be treated as two decisions, one in respect of each visa. It may be accepted that there was a close relationship between the two decisions. In particular, they were expressed in the one instrument and singular language (“decision”) was used in the decision record. Nevertheless, in circumstances where the statutory scheme established two different visas, each with their own criteria, the first delegate’s decision to reject the appellant’s application should be treated as two decisions.

*Once it is accepted that the first delegate’s decision should be treated as two decisions, it follows that it is conceptually possible for one of the decisions to be affected by jurisdictional error, and the other to have been validly made.”*¹³

56. In this context, Moshinsky J held that it was open to an administrative decision-maker, (in the current case the analogous decision-maker would be Damien), to revisit one of the two visas decisions made by him, on the basis that it was affected by jurisdictional error and make it again, whilst leaving the other one unaffected, on the basis that it had been appropriately made. In reaching this decision, His Honour applied the principles enunciated, by the High Court, in *Minister for Immigration & Multicultural Affairs v Bhardwaj*.¹⁴

¹² *Basra v Minister for Immigration & Border Protection* [2018] FCA 422

¹³ *Ibid* at [36] – [37]

¹⁴ *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597

57. In *Bhardwaj* Gaudron and Gummow JJ said as follows:

*“... a decision involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all. Once that is accepted, it follows that, if the duty of the decision-maker is to make a decision with respect to a person's rights but, because of jurisdictional error, he or she proceeds to make what is, in law, no decision at all, then, in law, the duty to make a decision remains unperformed. Thus, not only is there no legal impediment under the general law to a decision-maker making such a decision but, as a matter of strict legal principle, he or she is required to do so.”*¹⁵

58. In my view, I am bound to apply this line of reasoning to the present case. As such, I accept that the first decision of Damien, regarding Ms Tam's application for a permanent visa, because of the error surrounding its communication, had no legal foundation. The same cannot be said of the decision concerning the temporary visa, which remained jurisdictionally intact and valid.

59. This remained the case after the determination of the MRT made on 24 April 2014. The decision to confirm the delegate's decision not to grant the temporary visa to Ms Tam was affirmed, after a merits review process to which no subsequent challenge has been made.

60. Although I concede the issue is surrounded by a certain level of artificiality, the MRT, prior to the re-exercise of power by Damien, was also entitled to confirm its dismissal of the merits review of the temporary visa, on the basis of its assumption that the delegate had properly exercised his authority in respect of his refusal to grant it and notify Ms Tam properly in respect of it.

61. Thereafter, the delegate, as he was entitled to do, elected to revisit his decision in respect of Ms Tam's permanent visa and correct apparent errors regarding its transmission to the applicant. His actions converted the void decision into a valid one, albeit one which was subject to the statutorily based right to an independent merits review in the AAT.

¹⁵ Ibid at 616

62. Accordingly, I am satisfied that the only jurisdictional issue, which fell to be determined before the AAT, was whether Ms Tam and by necessary implication Master Tam satisfied the principle criterion required to be satisfied before a permanent visa was granted, namely whether the applicant held or had held a valid temporary visa.
63. In my view, the evidence available to the AAT could have only led to the logical conclusion that Ms Tam had not satisfied the necessary visa conditions for the grant of a permanent visa. Accordingly, the AAT correctly exercised the jurisdiction conferred upon it. More significantly, it had no jurisdiction to conduct a merits hearing into the circumstances surrounding the delegate's refusal of the temporary visa.
64. In these circumstances, the applicant's other complaints of jurisdictional error concerning the purposed illogicality or unreasonableness of the decision and any issues relating to procedural fairness fall away. It cannot be established that the AAT took into account any irrelevant consideration or failed to take into account any relevant considerations.
65. The decision reached by the AAT was in accordance with Ms Tam's evidence – she did not hold and had never held a temporary visa. In these circumstances, she was not denied a proper opportunity to put her case in respect of the matters falling to be decided by the AAT within the jurisdiction conferred upon it, namely whether Ms Tam satisfied the essential pre-condition for the grant of a permanent visa.
66. It had no jurisdiction to re-determine issues germane to the decision not to grant her a temporary visa. In these circumstances, the AAT had no jurisdiction to entertain submissions and evidence germane to the nature of Ms Tam's relationship to Mr Munn. Accordingly, I can detect no jurisdictional error in the relevant findings of the AAT.
67. One final matter remains. As a consequence of these proceedings and the production of the resulting court book, which contained documents germane to the proceedings before the MRT, the applicant became aware of the section 375A certificate issued by Damien. She complains that she was not informed of the existence of this certificate and to comment upon it. In these circumstances, she asserts that she has been denied procedural fairness.

68. The certificate in question was potentially relevant only to the proceedings before the MRT, which are not subject to judicial review in these proceedings. Like the applicant, I am unaware of the actual content of the document(s) covered by the certificate. The MRT did not allude to their nature in its decision. In theoretical terms, the non-disclosure of these documents may potentially have implications for the decision of the MRT but that is not a decision which is subject to review in the current proceedings.
69. The first respondent concedes that the applicant was not given an opportunity to comment on the existence of this certificate in the AAT proceedings. However, it is clear from a fair reading of the Tribunal's reasons that the contents of the documents covered by the certificate can have had no bearing on the outcome of the case, which was determined solely on the applicant's inability to satisfy the essential pre-condition to the grant of the visa sought by her, namely that she held or had previously held a temporary visa.
70. In these circumstances, the first respondent contends both that the applicant has not been procedurally disadvantaged and secondly, even if she had, it would be futile to grant the relief sought by her because it is impossible for her to ever satisfy the essential applicable visa condition.¹⁶
71. I agree. The certificate in question had no bearing on the AAT's decision and was not relevant to the issue before the Tribunal. The only decision open to the AAT was to affirm the Delegate's decision, given the fact that the two visas in question and the relevant decisions in respect of each of them was distinct from the other. This being so, given the applicant had not held a temporary visa, it was incumbent on both the Delegate and subsequently the AAT to decline to grant her a permanent visa.
72. In these circumstances, the application must be dismissed. The first respondent seeks costs fixed in an amount of \$6,000.00. I will make an order to this effect.
73. For all these reasons, the orders of the court will be as set out at the commencement of these reasons for judgment.

¹⁶ See *Minister for Immigration & Border Protection v CQZ15* [2017] FCAFC 194 at [69]

I certify that the preceding seventy (70) paragraphs are a true copy of the reasons for judgment of Judge Brown

Date: 20 December 2018